Supreme Court, U.S.
FILED
DEC 27 1996
CLERK

No. 96-803

In The

Supreme Court of the United States

October Term, 1996

STEVEN D. SITKOFF and BERNICE E. SITKOFF, Individually and as Parents and Natural Guardians of Jessica Sitkoff, a Minor, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased,

Petitioners,

vs.

BMW OF NORTH AMERICA, INC. and BAVARIAN MOTOR WORKS, A.G.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM F. KINIRY, JR.
Counsel of Record
O. DANIEL ANSA
PIPER & MARBURY L.L.P.
Attorneys for Respondents BMW of North America, Inc. and Bayerische Motoren Werke Aktiengesellschaft
3400 Two Logan Square
18th & Arch Streets
Philadelphia, Pennsylvania 19103
(215) 656-3300

70228 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

35 pp

QUESTION PRESENTED

Whether this Court should grant certiorari in this state product liability "crashworthiness" case for the purpose of addressing the administration of summary judgment under Rule 56 of the Federal Rules of Civil Procedure, where the district court was required to dismiss Petitioners' claims pursuant to Rule 56 and find for the Respondents as a matter of law after an on the record review of the merits of Petitioners' case, where Petitioners were afforded adequate review at the circuit court level, and where action by this Court cannot provide any meaningful relief to Petitioners?[1]

---

1. Note: Respondents do not agree with the third "Question Presented For Review" inasmuch as that question is an improper attempt to characterize the grant of summary judgment as a "sanction" as opposed to a reasoned analysis of the record submitted by the parties and the law.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Bayerische Motoren Werke Aktiengesellschaft is a German corporation. It has no United States parent or nonwholly owned subsidiary corporations. It has numerous wholly owned subsidiary corporations including BMW of North America, Inc. BMW of North America, Inc. is a corporation organized under the laws of Delaware. It has no nonwholly owned subsidiary corporations. The caption of the case does not list all parties in the proceeding below. The names of all parties are listed in the Third Circuit's caption to its opinion, appearing in Petitioner's Appendix at 4a. *See also Sikoff v. BMW of North America, Inc. v. Estate of Schreiber*, [illegible] 1172 (3d Cir. 1996).

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Rules Involved	1
Counterstatement of the Case	1
Reasons for Denying the Writ	12
I. The district court properly granted Respondents' motion for summary judgment because Petitioners failed to produce any evidence creating a fact issue on all three essential elements of their crashworthiness claim and, alternatively, failed to invoke the protection of Rule 56(f).	12
A. Petitioners failed to create any genuine issue of material fact.	13
B. Petitioners did not properly invoke Rule 56(f) protection even under the most liberal standard applied by the Third Circuit below.	17
1. Petitioners failed to identify the information sought with specificity.	18

Contents

Page

2. Petitioners failed to justify the delay in recovering the information. 19

3. Petitioners failed to show how the discovery of the unspecified information would have precluded the entry of summary judgment. 20

II. Grant of summary judgment in favor of Respondents after an on the merits examination pursuant to Rule 56 was not the equivalent of a dismissal for discovery sanction. 22

Conclusion 25

TABLE OF CITATIONS

Cases Cited:

Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168 (3d Cir. 1990) 23, 24

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 13, 14

Celotex v. Catrett, 477 U.S. 317 (1986) 13, 22, 23

Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992) 17

Dion v. Graduate Hosp., 360 Pa. Super. 416, 520 A.2d 876 (1987) 14, 15

Contents

	Page
Dunlap v. Transamerica Occidental Life Ins. Co., 858 F.2d 629 (11th Cir. 1988)	24
Foster v. Arcata Assoc., Inc., 772 F.2d 1453 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986)	17
Geear v. Boulder Community Hosp., 844 F.2d 764 (10th Cir. 1988)	24
Guthrie v. Sawyer, 970 F.2d 733 (10th Cir. 1992)	17
Harkins v. Calumet Realty Co., 418 Pa. Super. 405, 614 A.2d 699 (1992)	14
Humphreys v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078 (8th Cir. 1993)	17
In Re Liberty Trust Co. v. Leslie, 903 F.2d 1053 (5th Cir. 1990)	24
Jaroma v. Massey, 873 F.2d 17 (1st Cir. 1989)	23, 24
Kupetz v. Deere & Co., 435 Pa. Super. 16, 644 A.2d 1213 (1994)	14
Lunderstadt v. Colafella, 885 F.2d 66 (3d Cir. 1989)	17
Mills v. Ford Motor Co., 142 F.R.D. 271 (M.D. Pa. 1990)	14

Contents

Page

Nguyen v. CNA Corp., 44 F.3d 234 (4th Cir. 1995) ... 17

Resolution Trust Corp. v. North Bridge Assoc. Inc., 22 F.3d 1203 (1st Cir. 1994) 17, 18

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 97 (1958) 23

St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309 (3d Cir. 1994) 17, 18

Stackhouse v. Mazurkiewicz, 951 F.2d 29 (3d Cir. 1991) 23

Tennis v. Fedorwicz, 140 Pa. Commw. 7, 592 A.2d 116 (1991) 14

Wichita Falls Office Assoc. v. Banc One Corp., 978 F.2d 915 (5th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993) 17, 18

Rules Cited:

E.D. Pa. R. Civ. P. 7(1)(c) 16

E.D. Pa. R. Civ. P. 20 ..... 1, 9, 16

E.D. Pa. R. Civ. P. 20(c) 16

Fed. R. Civ. P. 37 ..... 22, 23

Contents

Page

Fed. R. Civ. P. 37(g) 6

Fed. R. Civ. P. 56 .....i, 1, 10, 12, 13, 15, 21, 22, 23, 24

Fed. R. Civ. P. 56(e) 15

Fed. R. Civ. P. 56(f) 10, 11, 12, 13, 17, 18, 21

Supreme Court Rule 10 ..... 12, 13

Supreme Court Rule 15.2 1

APPENDIX

Appendix A — United States District Court for the Eastern District of Pennsylvania, Local Rule of Civil Procedure 20 ..... 1a

BMW of North America, Inc. and Bayerische Motoren Werke Aktiengesellschaft (hereinafter referred to jointly as "Respondents" or "BMW NA" and "BMW AG" respectively), respectfully request that this Court deny the Petition of Steven D. Sitkoff and Bernice E. Sitkoff, Individually and as Parents and Natural Guardians of Jessica Sitkoff, A Minor, and as Administrators of the Estate of Gwyn Allison Sitkoff, Deceased ("Petitioners") for review of the action of the United States Courts of Appeals for the Third Circuit.

RULES INVOLVED

In addition to the rules cited by Petitioners, *see also* United States District Court for the Eastern District of Pennsylvania, Local Rule of Civil Procedure 20, which appears in the appendix to this brief in opposition. (Resp. App., 1a).

COUNTERSTATEMENT OF THE CASE

The Petition contains various omissions, misstatements and errors concerning the underlying facts and procedural history of this "crashworthiness" case brought pursuant to substantive product liability legal theories under Pennsylvania state law and Federal Rules of Civil Procedure. In particular, Respondents do not agree that Petitioners' statement of the case (Petition at 2-6) or analysis of the factual basis for the Third Circuit's affirmation of the district court's order granting summary judgment (Petition at 8-17) presents a fair review of the record. Contrary to Petitioners' suggestion, this case does not present an important question in the administration of summary judgment motions under Rule 56 nor does it involve dispositive discovery sanctions. What follows is an outline of the underlying factual issues designed to put the case in perspective and to comply with Supreme Court Rule 15.2.

Petitioners filed a complaint against Respondents in the United States District Court for the Eastern District of Pennsylvania on July 15, 1993, seeking recovery for alleged enhanced injuries to their decedent and surviving minor resultant from a construction related highway accident wherein a motor vehicle in which these persons were riding was caused to crash through a guard rail, go airborne, strike a large unyielding tree, descend an embankment and flip upside down. Petitioners alleged that the Respondents were the sellers, distributors and/or manufacturers of the 1988 BMW 325i convertible and liable to Petitioners for the damages they sustained as a result of that vehicle's lack of crashworthiness pursuant to legal theories of strict liability, negligence, breach of warranty and punitive damages.

Such a claim for enhanced injuries is commonly known as a "crashworthiness claim." In order to make out such a claim under Pennsylvania law, the Petitioners were required to prove: (1) that the design of the automobile was defective and that when the design was made, an alternative, safer design practicable under the circumstances existed; (2) what injuries, if any, would have resulted to the Petitioners' surviving minor and decedent had the alternative, safer design, in fact been used; and (3) some method of establishing the extent of enhanced injuries to Petitioners' surviving minor and decedent attributable to the defective design.

On September 9, 1993, BMW NA served Petitioners with written discovery requesting, *inter alia*, the identity and reports of the expert witnesses Petitioners proposed to call to testify at trial. Nine months later, on June 24, 1994, Petitioners identified two automotive engineers as being experts expected to be used at trial, but failed to set forth the substance of their opinions or the basis for their testimony with any meaningful detail. Specifically, Petitioners stated that "[Petitioners] have not yet

conclusively determined the experts they will call at trial and will supplement their answer as this decision is made. At present, [Petitioners] intend to call Peter C. Bertelson, D.Sc. and Andrew N. Gilberg to testify on the subjects of occupant protection, crashworthiness, roll bar design, and the suitability and practicality of installing a roll bar in the vehicle ." (App. 53a). Petitioners never produced expert reports from these potential expert witnesses. Moreover, Petitioners did not identify an accident reconstructionist, a medical expert or a bio-mechanical expert who would provide testimony on the dynamics of the happening of this accident, the nature and extent of injuries, the nature and extent of so called "enhanced" injuries or to what extent the alleged "enhanced" injuries sustained by both Petitioners' surviving minor and decedent were attributable to the alleged defective design.

As stated in the Petition (Petition at 2), Petitioners served two sets of discovery requests asking for information about the design, manufacturing and testing of the 1988 BMW 325i convertible. On September 20, 1993, BMW NA responded to the first discovery requests and informed Petitioners, *inter alia,* that it did not design or manufacture the 1988 BMW 325i convertible. Moreover, in addition to its answers and objections to individual discovery requests, BMW NA set forth, in writing, its specific definitional and grammatical problems with certain of Petitioners' discovery requests which rendered many of these requests exceedingly overbroad, unintelligible, or both. BMW AG was not served with process until October 8, 1993 and did not file its answer until November 9, 1993. BMW AG was never served with Petitioners' first set of discovery requests.

On December 1, 1993, Petitioners served both Respondents with a second set of discovery requests asking for virtually the same information contained in their first set of discovery requests. On July 1, 1994, Petitioners filed a motion to compel

both BMW NA and BMW AG to respond to both their first and second set of discovery requests.

On July 18, 1994, BMW NA filed its response to Petitioners' discovery motion pointing out for the second time the specific definitional and grammatical problems existent within Petitioners' first set of discovery requests that rendered them unintelligible and impossible to answer. Also on July 18, 1994, BMW NA served its response to Petitioners' second set of discovery requests in which it again stated that it did not design or manufacture automobiles.

On July 18, 1994, BMW AG filed its response to Petitioners' discovery motion pointing out that BMW AG did not answer Petitioners' first set of discovery because those discovery requests had never been served upon BMW AG and had been issued at a time prior to BMW AG being served with original process. Contrary to Petitioners' assertion that "BMW AG failed to respond to either set of discovery requests" (Petition at 3), on July 18, 1994, BMW AG responded to Petitioners' second set of discovery requests and identified crash films, test reports, design drawings, approximately 220 photographic slides, 16 still photographs and video reproductions of vehicular rollover tests, and various documents relative to the BMW 325i and offered the same for inspection by Petitioners. (R. 507-516). *At no time during the course of this litigation have Petitioners or their expert witnesses ever asked to inspect these crash films and various documents.*

On October 20, 1994, the district court held a discovery conference concerning Petitioners' motion to compel discovery responses. During the conference, counsel for Respondents identified for the third time those specific definitional and grammatical problems existent within Petitioners' first set of discovery requests that rendered them exceedingly overbroad

and unintelligible. The district court ordered the parties to meet and work out their discovery difficulties. On October 24, 1994, the district court issued a Scheduling Order requiring Petitioners to serve expert reports on Respondents by January 13, 1995. (R. 801-805).

On October 25, 1994, counsel for the parties had their first face-to-face discovery conference. During this conference, Respondents' counsel pointed out for the fourth time those specific definitional and grammatical problems existent within Petitioners' discovery requests that rendered them exceedingly overbroad, unintelligible, or both. As a result of the conference, Petitioners agreed to investigate modification of certain discovery requests and Respondents agreed to provide responses to those discovery requests once modified to mutual satisfaction and understanding. Petitioners never provided modified discovery requests nor did Petitioners inspect those discovery documents concerning the design, manufacture and testing of the subject vehicle identified by BMW AG on July 18, 1994.

Petitioners did not submit expert reports by the January 13, 1995, deadline established by the October 24, 1994 Scheduling Order. Rather, on January 13, 1995, Petitioners filed their first non-compliant motion for extension to serve expert reports. In that motion, Petitioners claimed that they were unable to timely submit expert reports because: (1) Respondents failed to serve unspecified discovery responses intended to form the basis for the opinions of their experts; (2) Respondents intended to conduct a number of depositions; and (3) Petitioners' counsel's trial schedule prevented compliance with the Scheduling Order. (App. 807-809). Petitioners persisted in representing to the court that their automotive engineering experts could not prepare expert reports without unspecified discovery from Respondents despite Petitioners' affirmative decision not to inspect the crash films, test reports and various documents made available by BMW AG

at its counsel's office. In addition, despite the allegations set forth in Petitioners' complaint and the well established elements necessary to proffer and sustain a crashworthiness claim, Petitioners did not address in their motion their failure to identify an accident reconstructionist, a medical expert or a bio-mechanical expert who would provide testimony on the dynamics of this accident, the nature and extent of injuries, the nature and extent of "enhanced" injuries or how the "enhanced injuries" sustained by the Petitioners' decedent and surviving minor were attributable to the alleged defective design of the automobile. Moreover, Petitioners had no excuse for such omission inasmuch as they had exclusive possession of the subject automobile for over four years and complete control over the medical and damages aspects of this case.[2]

Contrary to Petitioners' assertions that Respondents opposed the motion for extension (Petition at 3), despite the incredulous reasons stated by Petitioners in support of their first motion for extension and Petitioners' failure to comply with the district court's Scheduling Order, Respondents agreed not to oppose Petitioners' motion and not to pursue sanctions under Fed. R. Civ. P. 37(g) to which Respondents were entitled under the Scheduling Order. (R. 820-823). As a result, the district court

---

2. For example: Petitioners' decedent was interred without autopsy. In investigating the nature and extent of the particular injuries suffered by the decedent, Respondents' counsel attempted to speak with Mr. Ron Dellavechia, Petitioners' mortician. Mr. Dellavechia refused to speak with Respondents' counsel without the prior permission of the Petitioners. Respondents' counsel brought this issue to the attention of Petitioners' counsel who initially agreed to permit Mr. Dellavechia to be interviewed, then withdrew that permission, then stated that "the Sitkoff family didn't want this done during the holiday season," then agreed to permit the interview at some unspecified future time which never occurred all of which control exercised by Petitioners and their counsel resulted in the defense being forced to issue and serve a subpoena to compel his testimony.

entered an order granting Petitioners' motion for extension to serve expert reports and reiterated its procedural requirements for filing motions to extend deadlines. The district court also issued a new Scheduling Order dated February 24, 1995, establishing May 1, 1995 as the new deadline for submission of Petitioners' expert reports. (R. 830-834).

On February 20, 1995, at the insistence of Respondents, counsel for the parties conducted their second face-to-face discovery conference. During this conference, Respondents' counsel pointed out for the fifth time those specific definitional and grammatical problems existent within Petitioners' discovery requests that rendered them exceedingly overbroad, unintelligible, or both. Again, Petitioners agreed to investigate modification of certain discovery requests and Respondents agreed to provide responses to those discovery requests once modified to mutual satisfaction and understanding. Moreover, despite Petitioners' counsel's physical presence at the offices of Respondents' counsel, no request was made to review the crash films, test reports or other discovery documents identified by BMW AG on July 18, 1994, in response to Petitioners' second set of discovery requests.

On March 10, 1995, counsel for Respondents wrote a letter to Petitioners' counsel in an effort to advance discovery. Petitioners were once again invited to review films, color slides and contact sheets regarding vehicle tests identified in BMW AG's July 18, 1994 discovery responses. Also an inquiry was made regarding Petitioners' agreement to provide discovery definitions. (R. 1406). Petitioners did not acknowledge or respond to the letter, provide modified discovery requests or inspect those discovery documents identified by BMW AG on July 18, 1994, concerning the design, manufacture and testing of the BMW 325i.

Petitioners did not submit expert reports by the May 1, 1995, deadline established by the February 24, 1995 Scheduling Order. Rather, on May 1, 1995, Petitioners filed their second non-compliant motion for extension to serve expert reports. (R. 881-883). Petitioners stated reasons for their second non-compliant motion included Respondents' alleged refusal to comply with unspecified discovery requests as well as the need of their consultants to review the testimony of certain witnesses scheduled to be deposed by the Respondents. These witnesses were the Petitioners themselves, their surviving daughter and their mortician. Petitioners continued to represent to the district court that their automotive engineering experts could not prepare expert reports without (unspecified) discovery from Respondents despite Petitioners' affirmative decision not to inspect the crash films, test reports and various documents made available for inspection by BMW AG at its counsel's office. Once again, Petitioners also failed to identify an accident reconstructionist, a medical expert or a bio-mechanical expert or issue reports regarding the dynamics of this accident, the nature and extent of injuries, the nature and extent of "enhanced" injuries or to what extent the "enhanced" injuries allegedly sustained by the Petitioners' decedent and surviving minor were attributable to the alleged defective design of the vehicle, all of which are essential elements in a crashworthiness claim.

On May 8, 1995, Respondents filed a motion for summary judgment alleging, *inter alia*, that Petitioners' failure to identify necessary experts and produce expert reports in accordance with the court's established deadline precluded them from introducing expert testimony at trial, without which Petitioners could not sustain their crashworthiness claim. (R. 888-905). Based upon the record there were no genuine issues of material fact concerning the essential elements of the crashworthiness claim because Petitioners were unable to show whether the subject automobile was defectively designed; whether either Petitioners'

surviving minor or decedent had sustained "enhanced" injuries and the nature of the same; and whether the alleged defects or the alleged negligence of the Respondents was a substantial factor in causing the alleged "enhanced" injuries sustained by Petitioners' surviving minor or decedent.

Additionally, Respondents timely filed a memorandum opposing Petitioners' second non-compliant motion for extension to serve expert reports. (R. 948-953). This memorandum identified Petitioners' failure to show good cause for their inability to comply with the February 24, 1995 Scheduling Order. For over ten months, BMW AG had made available to Petitioners the information they asked for in their second discovery requests, such as various crash test films, photographs, slides and other documents, and not once during that period of time did Petitioners ever ask to review the same. In addition, Petitioners claimed that they needed to conduct additional discovery consisting of the depositions of mortician, a witness under the control of Petitioners, and the depositions of Petitioners themselves. Moreover, Petitioners failed to identify an accident reconstructionist, a medical expert or a bio-mechanical expert who would provide testimony on the dynamics of this accident, the nature and extent of injuries, the nature and extent of "enhanced" injuries or to what extent the "enhanced" injuries of the Petitioners' decedent and surviving minor were attributable to the alleged defective design of the vehicle, the submission of which were not dependent upon any discovery from the Respondents.

Although on May 31, 1995, Petitioners filed a document entitled Memorandum of Law in Opposition to Motion for Summary Judgment and Cross-Motion for Ruling on Outstanding Motions, they did not respond to the well pleaded allegations contained in Respondents' motion for summary judgment as required by Local Rule of Civil Procedure 20. (R.

971-980). Furthermore, Petitioners made no effort to offer any additional evidence of record which would establish the existence of each element of their crashworthiness claim. In neglecting to contest Respondents' allegations or provide additional evidence, Petitioners failed to establish on the record any issue of fact with respect to the essential elements of their claim.

Petitioners opposed the Rule 56 motion by asserting that Respondents were not forthcoming with the discovery responses necessary for the preparation of their automotive engineering expert reports and stated their alleged need to depose the decedent's mortician and Petitioners themselves. However, no affidavits were issued in support of their opposition memorandum of law, and no effort was made to constructively meet the technical requirements of Rule 56(f) by identifying with specificity what particular information was necessary from the Respondents and how, if the discovery was uncovered, it would preclude summary judgment.

By Order and Memorandum issued on July 14, 1995, the district court in first concluding that Petitioners failed to sufficiently oppose Respondents' Rule 56 motion, granted summary judgment, denied Petitioners' Motion for Enlargement of Time in Which to Serve Expert Reports, and denied Petitioners' Cross-Motion for ruling on Outstanding Discovery Motions. (App. 11a-32a). After reviewing the summary judgment record, the court ruled that "[Petitioners could not] establish a genuine issue of material fact regarding the injuries, if any, that would have resulted if a safer alternative design had been utilized in the accident vehicle rather than the allegedly defective design. Because [Petitioners could not] produce evidence to support each element of their claims, [Respondents were] entitled to judgment as a matter of law." (App. 32a).

On July 28, 1995, Petitioners' filed a motion for reconsideration of the July 14, 1995 Order, attaching for the first time affidavits from three automotive engineering experts. (App. 6a). Petitioners did not serve affidavits from an accident reconstructionist, a medical expert or a bio-mechanical expert witness. (App. 9a). On August 11, 1995, Respondents opposed Petitioners' motion for reconsideration. In opposing the motion for reconsideration, Respondents contended that the purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. A motion for reconsideration is not a forum to relitigate the subject of the motion for summary judgment or to present evidence that is not newly discovered or available to the party before judgment was rendered on the summary judgment motion.

On November 22, 1995, the district court denied Petitioners' motion for reconsideration and ruled, *inter alia*, that "[Petitioners' failed] to demonstrate by means of at least preliminary expert reports or affidavits that the alleged defects in the accident vehicle caused or enhanced the injuries suffered by Gwyn and Jessica Sitkoff in the accident. Even the belated submission of affidavits which purport[ed] to support a Rule 56(f) motion fail[ed] to address the last, and most important issue. Consequently, there is no basis for reconsidering this [c]ourt's decision to grant [Respondents'] motion for summary judgment." (App. 10a).

Petitioners appealed the district court's grant of summary judgment to the Third Circuit Court of Appeals. On July 25, 1996, after reviewing the extensive record and briefs submitted by the parties and upon hearing oral argument, the Third Circuit affirmed, without dissent, the summary judgment order entered by the district court. (App. 3a). The Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied by the Third Circuit on August 22, 1996. (App. 1a). The

Petitioners filed this petition for writ of certiorari on November 20, 1996, which was placed on the docket on November 22, 1996.

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is not a matter of right, but of judicial discretion. The writ will be granted only "for compelling reasons." The Petitioners have failed to set forth any "compelling" reasons why this Court should grant the writ, other than Petitioners' dissatisfaction with the result below. Petitioners' argument centers around Petitioners' belief that the Third Circuit misapplied Rule 56 as well as its own mandatory six part test relating to dispositive discovery sanctions. Even if their belief is correct, which it is not, there are insufficient grounds for review, where the Third Circuit's decisions have all been unanimous, and no judge of the circuit considered the case worthy of *en banc* hearing. Moreover, Supreme Court Rule 10 clearly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the *misapplication of a properly stated rule of law*." (emphasis added).

I.

THE DISTRICT COURT PROPERLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE PETITIONERS FAILED TO PRODUCE ANY EVIDENCE CREATING A FACT ISSUE ON ALL THREE ESSENTIAL ELEMENTS OF THEIR CRASHWORTHINESS CLAIM AND, ALTERNATIVELY, FAILED TO INVOKE THE PROTECTION OF RULE 56(f).

The granting of summary judgment for Respondents and the dismissal of Petitioners' claims by the district court was

based on the Petitioners' failure to meet its substantive burden under Rule 56 as established by this Court and, furthermore, on Petitioners' failure to invoke the procedural protection of Rule 56(f) even under the most liberal standard adopted by the Third Circuit. The substantive application of Rule 56 is one that has been addressed repeatedly by this Court and strictly followed by the district and circuit courts. Moreover, although the circuit courts have varied in their applications of the procedural protections provided by Rule 56(f), the Petitioners' case was reviewed below pursuant to the more generous standard thus affording them the greatest opportunity for a finding in their favor. A finding by this Court that one interpretation of Rule 56(f) is more favorable than another would have no impact on the outcome of this case. As such, this case affords no opportunity to this Court to address a compelling legal issue or a conflict among the circuits concerning the application of Rule 56. To the contrary, it provides this Court only with an opportunity to decide whether Judge Troutman of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit misapplied a properly stated rule of law. Pursuant to Supreme Court Rule 10, such an assertion is insufficient to warrant the granting of a writ for certiorari.

A. Petitioners failed to create any genuine issue of material fact.

This Court has determined that Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon a properly supported motion, when the non-moving party fails to make a showing of "any *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis by this Court); *see also Celotex v. Catrett*, 477 U.S. 317, 324 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law

will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Moreover, the evidence offered by the non-moving party must establish a genuine issue such that the "jury could reasonably find for the plaintiff." *Id.* at 252. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.*

In this case, Petitioners asserted that the subject automobile was defective because it was not sufficiently "crashworthy." Under the "crashworthiness" doctrine, a seller of a defective product is liable in situations "in which the defect did not cause the accident, but rather increased the severity of the injury over that which would have occurred" absent the defect. *See, e.g., Mills v. Ford Motor Co.*, 142 F.R.D. 271, 272 (M.D. Pa. 1990). In order to establish such a claim under Pennsylvania law, Petitioners were required to prove the following: (1) that the design of the vehicle was defective and that when the design was made, an alternative, safer design practicable under the circumstance existed; (2) what injuries, if any, would have resulted to the Petitioners' decedent and surviving minor had the alternative, safer design, in fact, been used; and (3) some method of establishing the extent of Petitioners' decedent and surviving minor's enhanced injuries attributable to the alleged defective design. *Kupetz v. Deere & Co.*, 435 Pa. Super. 16, 644 A.2d 1213, 1219 (1994).

It is well settled under Pennsylvania law that the Petitioners cannot prove that a complex product was defectively designed without the aid of expert testimony. *Harkins v. Calumet Realty Co.*, 418 Pa. Super. 405, 614 A.2d 699, 707 (1992); *Tennis v. Fedorwicz*, 140 Pa. Commw. 7, 592 A.2d 116, 117 (1991). Similarly, expert testimony is required where the issues in the overall case are complex and require scientific or specialized knowledge or experience in order to be properly understood. *Dion v. Graduate Hosp.*, 360 Pa. Super. 416, 520 A.2d 876, 881

(1987). The proper design of an automobile and any enhanced injury attributable to the design of that automobile, involved in a horrific and complicated collision such as the one at bar, is unquestionably a subject requiring the use of multiple layers of expert testimony. Thus, without the aid of expert testimony, Petitioners could not prove that at the time of this accident, an alternative, safer design practicable under the circumstances existed; the injuries that would have resulted had the alternative safer design been used; or the extent of the "enhanced" injuries attributable to the alleged defective design.

Respondents' filed a properly supported Rule 56 motion for summary judgment, containing concise statements of fact and alleging, *inter alia,* that by failing to identify or produce reports from an automotive engineer, an accident reconstructionist, a medical expert, a bio-mechanical expert, or other witnesses possessing scientific or specialized knowledge and experience there were no genuine issues of material fact concerning the essential elements of their crashworthiness claim and that Respondents were entitled to judgment as a matter of law. (R. 888-905). Pursuant to Rule 56(e) and this Court's ruling in *Celotex*, Petitioners were obligated to set forth facts showing that there were genuine issues of material fact for trial and that the moving party was not entitled to judgment as a matter of law.

In response, the Petitioners filed a Memorandum of Law in Opposition to Motion for Summary Judgment and Cross-Motion for Ruling on Outstanding Discovery Motions.[3] (R. 971-980). Petitioners' response did not refute the factual allegations contained in the Rule 56 motion as required by E.D.

---

3. In their memorandum, they argued that summary judgment was inappropriate because their automotive engineering experts required: (1) the depositions of the [Petitioners] themselves; (2) the deposition of the mortician; and (3) certain undisclosed discovery responses from [Respondents].

Pa. R. Civ. P. 20,[4] was not supported by affidavits and failed to show that a genuine issue of material fact did exist with respect to the elements of their claim, including those essential elements concerned with the "enhanced" injuries attributable to the alleged defective design of the automobile. Petitioners' failure to create a factual issue on the "enhanced" injuries, a material element of their claim, necessarily rendered all other facts immaterial, leaving the district court no alternative but to grant the Rule 56 motion.[5]

---

4. Eastern District of Pennsylvania Rule of Civil Procedure 20(c), states in pertinent part:

> Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the courts directs otherwise, any party opposing a motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. . . . In the absence of timely response, the motion may be treated as uncontested.

E.D. Pa. R. Civ. P. 20(c) (effective May 31, 1990 and superseded by E.D. Pa. R. Civ. P. 7(1)(c) effective July 1, 1995).

5. Petitioners contend that they provided interrogatory answers that satisfied their evidentiary burden of production. This statement is incorrect. Petitioners offered no evidence, in their interrogatories or otherwise, from which a jury could reasonably find for the Petitioners under the substantive law applicable to this product liability "crashworthiness" case.

B. Petitioners did not properly invoke Rule 56(f) protection even under the most liberal standard applied by the Third Circuit below.

Federal Rule of Civil Procedure 56(f) gives a district court the discretion to delay judgment on a motion for summary judgment while critical discovery is pending. (App. 77a). The circuit courts have varied somewhat in their interpretation and application of Rule 56(f). Some circuits require that the party seeking the protection of 56(f) comply with the technical requirements of the Rule, including the submission of an affidavit setting forth the reasons for the delay.[6] Other circuits, including the Third Circuit below, have adopted a more liberal interpretation of Rule 56(f) and require only that the party seeking the protection of the Rule constructively meet the requirements of the Rule.[7]

An adoption of a liberal interpretation of Rule 56(f) does not mean, however, "that Rule 56(f) has no bite or that its prophylaxis extends to litigants who act lackadaisically . . . Rule 56(f) is designed to minister to the vigilant, not to those who slumber upon perceptible rights." *Resolution Trust Corp.*

---

6. *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995); *Humphreys v. Roche Biomedical Laboratories, Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993); *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1467 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986); *Guthrie v. Sawyer*, 970 F.2d 733, 738 (10th Cir. 1992).

7. *Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1203-1208 (1st Cir. 1994); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 918-919 (5th Cir. 1992); *Dean v. Barber*, 951 F.2d 1210, 1214 n. 3 (11th Cir. 1992); *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994) (citing *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989)).

v. North Bridge Assoc. Inc., 22 F.3d at 1203. Therefore, a party seeking the protection of Rule 56(f), even under the more generous standard, must meet a number of established benchmarks before the court will grant such protection. These benchmarks require that the party identify with specificity: (1) what particular information is sought; (2) why such information has not previously been obtained; and (3) how, if uncovered, the particular information would preclude summary judgment. *See St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994); *Resolution Trust*, 22 F.3d at 1203; *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993).

1. Petitioners failed to identify the information sought with specificity.

The district court noted that Petitioners failed to "identif[y] the information needed from [Respondents] in order to procure expert reports." (App. 26a). In fact, in their response, Petitioners made only the general assertion that "without the benefit of *the documents long ago requested* . . . [Petitioners] are unable to provide comprehensive expert reports . . . ." (R. 977) (emphasis added). It appears from these vague references that Petitioners expected the court to engage in an exercise of mind reading. The court could not assess the merits of Petitioners' opposition or be certain that Petitioners were attempting to delay summary judgment in good faith as it had no description whatsoever of the information that was sought.

Petitioners also alleged that in order for their automotive engineering experts to provide complete reports, they required the depositions of the Petitioners themselves and the deposition of the mortician. It is unlikely that Petitioners' automotive engineering experts were hampered in rendering opinions by the fact that the Respondents had not conducted the scheduled

depositions of Petitioners. Similarly, the mortician's deposition could not have been an impediment to Petitioners' experts when this witness was within the complete control of Petitioners. In fact, access to the mortician had been denied the Respondents by Petitioners despite a request of six months duration.

2. Petitioners failed to justify the delay in recovering the information.

Petitioners assert that "BMW AG failed to respond to either set of discovery requests . . ." (Petition at 3). This allegation is false, misleading and baseless. In fact, Petitioners' conceded in other documents filed with the district court that Respondents "have made certain materials available for inspection." (R. 882). Without ever having examined these discovery materials, Petitioners insisted that additional undefined alleged critical discovery was necessary.

The Respondents answered Petitioners' discovery requests that were intelligible and capable of being answered. The Respondents identified (1) in writing, (2) before the court, and (3) in two separate court ordered discovery conferences with counsel for Petitioners, those areas of Petitioners' discovery requests which required further definition before factual responses could be made. However, despite these efforts, counsel for Petitioners refused to provide this recognized necessary detail, reporting only that they would take the matter "under advisement." In addition, on July 18, 1994, in response to Petitioners' second set of discovery requests, BMW AG identified crash films, test reports, design drawings, approximately 220 photographic slides, 16 still photographs and video reproductions of vehicular rollover tests, and various documents relative to the BMW 325i and repeatedly offered the same for inspection by Petitioners. (R. 515-516). After reviewing the record, the district court below found that Petitioners failed to

provide any "explanation of how [Respondents' alleged] unresponsiveness to [Petitioners'] prior discovery request prevented Petitioners from offering expert evidence relating to their claims of injury." (App. 30a).

3. Petitioners failed to show how the discovery of the unspecified information would have precluded the entry of summary judgment.

Moreover, the Petitioners failed to show how the discovery of the unspecified information would have precluded the granting of summary judgment for Respondents as a matter of law. In fact, the district court analyzed this very issue in its Memorandum and Order granting summary judgment. The district court noted that "the [Petitioners] failed to articulate the precise reasons why additional discovery from [Respondents would] support substantive opposition to [Respondents'] motion for summary judgment." (App. 31a). Thus, even if Petitioners had obtained this unspecified information, it would not have affected the district court's decision to grant Respondents' motion for summary judgment.

At no time did the Petitioners identify an accident reconstructionist, a medical expert or a bio-mechanical expert, let alone allege that the Respondents did something to impede their ability to identify such experts or have such experts provide testimony regarding the dynamics of this accident or the "enhanced injury" elements of their crashworthiness claim. Because Petitioners' claims must necessarily be dismissed upon Petitioners' failure to raise an issue of fact with respect to *any* element necessary to their claims, even if the unspecified discovery of which Petitioners complain had been acquired, Petitioners' case would have been dismissed as a matter of law. (App. 32a).

Therefore, after reviewing the merits of the record submitted by both parties to the motion, the district court held that: (1) "although [Petitioners] have moved for an extension of time to produce expert opinion(s), they have not explained why expert medical evidence, at least, has not been obtained, have not demonstrated that some aspect of past discovery prevented them from obtaining expert evidence and have not established that further discovery will permit them to obtain the necessary expert evidence . . . [and] . . . have not shown the good cause necessary for an enlargement of time to conduct discovery" (App. 31a); (2) "[w]ith respect to [Respondents'] motion for summary judgment, [Petitioners] concede, and the [c]ourt concludes, that expert testimony is necessary in this action to establish a defect which caused enhanced injuries as well as to establish the enhanced injuries suffered because of the alleged defective design. [Petitioners] have not, however, produced any expert evidence in support of their claim. Without expert testimony, and, indeed, without any affidavit or other evidence offered in opposition to [Respondents'] motion for summary judgment, there is no evidence of record to support [Petitioners'] crashworthiness claim" (App. 31a); (3) "[f]inally, the [Petitioners] have failed to properly oppose summary judgment based upon the need for further discovery by submitting a motion and affidavit in accordance with Rule 56(f), and have failed to articulate the precise reasons why additional discovery from [Respondents] will support substantive opposition to [Respondents'] motion for summary judgment. Hence, [Petitioners'] cross-motion for ruling on outstanding discovery motions will be denied." (App. 31a-32a).

In order to survive Respondents' Rule 56 motion for summary judgment Petitioners were required, as a matter of law, to file a response which either established a genuine issue of material fact for all three essential elements of their crashworthiness claim or invoke the protection of Rule 56(f).

Petitioners did neither. After a meritorious review of the record submitted by the parties in accordance with the summary judgment standard espoused by this Court, the district court properly concluded that it was required as a matter of law to grant summary judgment for Respondents.

II.

GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS AFTER AN ON THE MERITS EXAMINATION PURSUANT TO RULE 56 WAS NOT THE EQUIVALENT OF A DISMISSAL FOR DISCOVERY SANCTION.

This case does not present the Court with an opportunity to address Rule 37 discovery sanctions that have peremptory effect because Petitioners' complaint was not dismissed as a discovery sanction. Rather, Petitioners' claims were dismissed pursuant to Respondents' Rule 56 summary judgment motion and Petitioners' response to the same, and only after the district court made a substantive, on the merits determination that Petitioners failed to show the existence of any genuine issue of material facts and therefore could not sustain the essential elements of their crashworthiness claim. Under the standards set forth by this Court in *Celotex*, the district court was required as a matter of law to grant summary judgment for Respondents.

Petitioners are obviously dissatisfied with the Third Circuit's affirmation of the district court's granting of summary judgment for Respondents. Their Petition is nothing more than a third effort to salvage their claims which were unsupported by the facts of this case. Instead of presenting a fair review of the record to this Court, Petitioners are improperly attempting to characterize the grant of summary judgment as a "sanction" as opposed to a reasoned analysis of the record submitted by the

parties and the law and would have this Court believe that they were deprived of their day in court without the opportunity for meaningful review.

Petitioners suggest that the Third Circuit and district court ruled in their case without regard to constitutional limitations and cite as their authority *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). However, Petitioners failed to acknowledge that in *Societe Internationale* this Court explained that these constitutional limitations are necessary because Rule 37 permits a court "to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* at 209. In this case, the constitutional limitations upon the power of the district court were clearly delineated in the procedures of Rule 56 and the summary judgment standards established by this Court in *Celotex*, which inherently require an examination of the merits of the non-moving party's cause or provide a means for the non-moving party to delay such an examination.

Moreover, there is no authority supporting the argument that a dismissal of an action pursuant to the well established procedures and standards set forth by Rule 56 can acquire the character of a sanction and thus require the limitations imposed upon a court when dismissing an action pursuant to Rule 37. To the contrary, those circuit courts cited by the Petitioner that have addressed the issue have uniformly held that "summary judgment under Rule 56 is not entered as a sanction." *Anchorage Assoc. v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 178 (3d Cir. 1990).[8] Therefore, when "the court

---

8. *See also Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991) (finding that the imposition of dismissal pursuant to a local rule would not acquire the character of a sanction unless the motion to dismiss was granted solely because it had been unopposed); *Jaroma v. Massey*, 873 F.2d 17, 20-

(Cont'd)

determines that the moving party is entitled to judgment as a matter of law based on the facts presented in the motion, [and the response thereto] . . . neither a hearing nor consideration of [those factors limiting a courts discretion under Rule 37] are required before judgment is entered." *Id.* at 176.

(Cont'd)

21 (1st Cir. 1989) (holding that the imposition of dismissal pursuant to the local rule would not acquire the character of a sanction and, thus, would not "run afoul of the requirements of Fed. R. Civ. P. 56" as long as the court first inquires as to whether the motion supports a finding that there is no genuine issue of material fact on the record); *Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cir. 1988) (dismissal pursuant to local rule will acquire the character of a sanction only if the court fails to review the case on the merits); *In Re Liberty Trust Co. v. Leslie*, 903 F.2d 1053, 1055 (5th Cir. 1990) (entry of summary judgment on the merits will not be deemed to be tantamount to judgment by default); *Geear v. Boulder Community Hosp.*, 844 F.2d 764 (10th Cir. 1988) (local rule permitting dismissal after review on the merits does not conflict with Fed. R. Civ. P. 56).

CONCLUSION

The petition for writ of certiorari should be denied in all respects.

Respectfully submitted,

WILLIAM F. KINIRY, JR.
Counsel of Record
O. DANIEL ANSA
PIPER & MARBURY L.L.P.
Attorneys for Respondents
BMW of North America, Inc. and
Bayerische Motoren Werke
Aktiengesellschaft
3400 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103
(215) 656-3300

Dated: December 31, 1996

APPENDIX A — UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, LOCAL RULE OF CIVIL PROCEDURE 20

RULE 20. MOTION PRACTICE

(a) Every motion shall be accompanied by a form of order which, if approved by the court, would grant the relief sought by the motion. Every response in opposition to a motion shall be accompanied by a form of order, which, if approved by the court, will deny or amend the relief sought by the motion.

(b) Every uncontested motion shall be accompanied by a certificate of counsel that such motion is uncontested.

(c) Every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the court directs otherwise, any party opposing the motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. (*Note:* pursuant to F.R.Civ.P. 6(e), an additional three (3) days shall be allowed if service is made by mail.) In the absence of timely response, the motion may be treated as uncontested. The court may require or permit further briefing if appropriate.

(d) Every motion not certified as uncontested shall be accompanied by a written statement, as to the date and manner of service of the motion and supporting brief.

(e) Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a

writing delivered to the Court Reporter Coordinator, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion must be dismissed for lack of prosecution.

(f) Any interested party may request oral argument on a motion. The court may require oral argument, whether or not requested by a party. The court may dispose of a motion without oral argument.

(g) Motions for reconsideration or reargument shall be served within ten (10) days after the entry of the judgment, order, or decree concerned.

Effective May 31, 1990.